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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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11 CENTER FOR BIOLOGICAL DIVERSITY,

No. C-08-2999 MMC

12 Plaintiff,

**ORDER TO SHOW CAUSE; AFFORDING  
PLAINTIFF OPPORTUNITY TO FILE  
SUR-REPLY; CONTINUING HEARING**

13 v.

14 MICHAEL CHERTOFF, et al.,

15 Defendants.  
16 \_\_\_\_\_/

17 Before the Court are plaintiff's motion for summary judgment, filed August 26, 2008,  
18 and defendants' cross-motion for summary judgment and opposition to plaintiff's motion,  
19 filed November 14, 2008. On December 12, 2008, plaintiff filed a combined opposition to  
20 defendant's cross-motion and reply to defendants' opposition to plaintiff's motion. On  
21 January 9, 2009, defendants' filed a reply to plaintiff's opposition to defendants' cross-  
22 motion.

23 In the instant action, plaintiff alleges defendant United States Coast Guard ("Coast  
24 Guard") has violated § 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C.  
25 § 1536(a)(2) ("§ 7(a)(2)") by failing to consult with the National Marine Fisheries Services to  
26 "ensure" that the Coast Guard's "activities under" the Ports and Waterways Safety Act  
27 ("PWSA"), 33 U.S.C. § 1221 et seq., "in the Santa Barbara Channel and other shipping  
28 lanes off the California coast . . . will not jeopardize the continued existence of threatened

1 and endangered species.” (See Compl. ¶ 43.) Section § 7(a)(2) of the ESA provides, in  
 2 relevant part:

3 “Each Federal agency shall, in consultation with and with the assistance of the  
 4 Secretary, insure that any agency action authorized, funded, or carried out by such  
 5 agency . . . is not likely to jeopardize the continued existence of any endangered  
 6 species or threatened species or result in the destruction or adverse modification of  
 7 habitat of such species which is determined by the Secretary, after consultation as  
 8 appropriate with affected States, to be critical, unless such agency has been granted  
 9 an exemption for such action by the Committee pursuant to subsection (h) of this  
 10 section.

11 See § 7(a)(2). Under the PWSA, the Coast Guard, among other things, “may construct,  
 12 operate, maintain, improve, or expand vessel traffic services, consisting of measures for  
 13 controlling or supervising vessel traffic or for protecting navigation and the marine  
 14 environment” and “may control vessel traffic in areas . . . which the Secretary determines to  
 15 be hazardous.” See 33 U.S.C. § 1223(a)(1), (4).

16 In their opposition and cross-motion, defendants argue that plaintiff has failed to  
 17 identify any “agency action,” see § 7(a)(2), taken by the Coast Guard within the six-year  
 18 limitations period for suits against the United States, as provided in 28 U.S.C. § 2401(a).  
 19 Specifically, defendants assert that any challenge to the Coast Guard’s amendment, in  
 20 2000, of three Traffic Separation Schemes (“TSS”) for ship traffic off the California coast<sup>1</sup> is  
 21 barred by the statute of limitations and that, for the period after 2000, neither two “Local  
 22 Notice[s] to Mariners” (see Opp’n & Cross-Mot. at 17:7-8) nor “new information about  
 23 increased incidence of blue whale mortalities during the fall of 2007” (see id. at 18:8-9  
 24 (internal quotation omitted)) triggered a duty to consult on the part of the Coast Guard.

25 Plaintiff, in its opposition and reply, asserts it “does not challenge the validity or  
 26 substance of the 2000 TSS decisions” (see Opp’n & Reply at 3:12-13 (emphasis in  
 27 original)) and that it “does not contend . . . that the mariners’ notices themselves trigger  
 28 particular ESA obligations” (see id. at 7:1-2). Rather, plaintiff asserts, its challenge is to

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29 <sup>1</sup>The TSSs at issue are the TSSs “in the Santa Barbara Channel . . . in the  
 30 approaches to Los Angeles-Long Beach . . . and off San Francisco.” (See Compl. ¶ 38.)  
 31 Regulations promulgated under the PWSA define a TSS as “a designated routing measure  
 32 which is aimed at the separation of opposing streams of traffic by appropriate means and  
 33 by the establishment of traffic lanes.” See 33 C.F.R. § 167.5(b).

1 “the Coast Guard’s failure to comply with the ESA consultation requirements in connection  
 2 with ongoing vessel management activities” (see id. at 5:14-6:2) and “ongoing traffic  
 3 management actions” (see id. at 7:7-8). Such ongoing activities, plaintiff contends,  
 4 constitute a “continuing violation” of the ESA, such that the statute of limitations  
 5 “commences to run anew each and every day that the [agency] does not fulfill the  
 6 affirmative duty required of it.” (See id. at 4:13-16 (quoting So. Appalachian Biodiversity  
 7 Project v. U.S. Fish & Wildlife Servs., 181 F. Supp. 2d 883, 887 (E.D. Tenn. 2001)  
 8 (alteration in original).)

9 Defendants, in their reply, argue that the Court “possesses jurisdiction only to the  
 10 extent that [plaintiff] is challenging the Coast Guard’s alleged implementation of the Santa  
 11 Barbara Channel TSS” and that, consequently, the Court lacks jurisdiction to consider  
 12 plaintiff’s challenge to “all other alleged but unidentified ‘shipping traffic management  
 13 actions’ supposedly undertaken by the Coast Guard.” (See Reply at 5:3-8.) In particular,  
 14 defendants contend, “implementation of the Santa Barbara Channel TSS” is the only  
 15 alleged violation identified in plaintiff’s “60-Day Notice of Intent to Sue.” (See Reply at 4:24-  
 16 5:1; Cummings Decl. Ex. C, at 7-9); see also 16 U.S.C. § 1540(g)(2) (providing “[n]o action  
 17 may be commenced” under ESA citizen suit provision “prior to sixty days after written  
 18 notice of the violation has been given to the Secretary, and to any alleged violator”);  
 19 Southwest Ctr. for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 520  
 20 (9th Cir. 1998) (noting § 1540(g)’s “sixty-day notice requirement is jurisdictional”).

21 As defendants’ jurisdictional argument is raised for the first time in their reply, and,  
 22 consequently, plaintiff has not had an opportunity to respond to such argument, the Court  
 23 will afford plaintiff an opportunity to file a sur-reply.

24 Further, to the extent plaintiff alleges violations of § 7(a)(2) arising from the Los  
 25 Angeles-Long Beach TSS or the San Francisco TSS (see Compl. ¶¶ 22-24, 37-40), plaintiff  
 26 is hereby ORDERED TO SHOW CAUSE why such claims should not be dismissed for lack  
 27 of subject matter jurisdiction, for the reason that plaintiff’s “60-Day Notice of Intent to Sue”  
 28 does not appear to identify any implementation of or action under such TSSs as

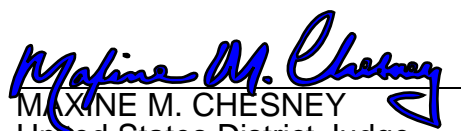
1 constituting alleged violations of the ESA (see Cummings Decl. Ex. C, at 7-9).

2 Accordingly, plaintiff shall file, no later than February 6, 2009, a combined sur-reply  
3 and response to the Court's Order to Show Cause. Defendants may file, no later than  
4 February 20, 2009, a reply to plaintiff's response to the Order to Show Cause.

5 In light of the above, the hearing on the plaintiff's motion for summary judgment and  
6 defendants' cross-motion for summary judgment is CONTINUED to March 6, 2009.

7 **IT IS SO ORDERED.**

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9 Dated: January 20, 2009

  
MAXINE M. CHESNEY  
United States District Judge